State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PHYLLIS L. GRIFFITH, Legal Guardian for
Douglas W. Griffith, a legally incapacitated adult,

Plaintiff-Appellee,

Supreme Court No. 122286

v

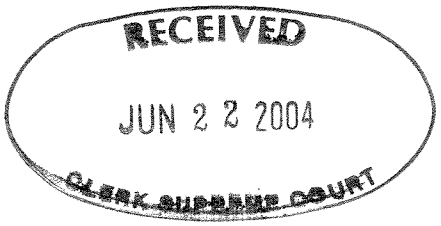
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant.

Court of Appeals No: 232517
Ingham County Circuit Court No: 97-87437-NF

BRIEF OF AMICUS CURIAE, AUTO CLUB INSURANCE ASSOCIATION

PROOF OF SERVICE



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STATEMENT OF INTEREST

Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION ("ACIA") is a reciprocal automobile inter-insurance exchange, organized under MCL 500.7200 et seq, to sell motor vehicle insurance in Michigan. ACIA issues approximately 25% of the no-fault policies in Michigan, making it one of the largest no-fault insurers in this state.

The issues presented by the parties to this appeal affect all no-fault insurers and, especially, ACIA because of the volume of no-fault policies that it issues.

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STATEMENT OF JURISDICTIONAL BASIS

On August 16, 2002, the Court of Appeals issued an unpublished per curiam opinion in this case. Griffith v State Farm Mutual Automobile Insurance Company, Court of Appeals No. 232517 (rel'd 8/16/02) (unpublished) (Appendix to STATE FARM Brief at **47a**). On September 5, 2002, Defendant-Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, filed its Application for Leave to Appeal with this Court. This Court had jurisdiction over STATE FARM's Application pursuant to MCR 7.301(2). STATE FARM's Application was timely filed pursuant to MCR 7.302(C)(2)(b).

On July 3, 2003, this Court denied STATE FARM's Application for Leave to Appeal. STATE FARM filed a timely motion for reconsideration on July 24, 2003. On August 27, 2003, Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION ("ACIA"), filed its Brief in Support of Defendant-Appellant's Application for Leave to Appeal and a Motion for Leave to Participate as Amicus Curiae in this appeal with this Court.

On March 19, 2004, this Court issued an Order granting the ACIA's Motion for Leave to Participate as Amicus Curiae. This brief is filed pursuant thereto. MCR 7.302(D).

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STATEMENT OF QUESTION PRESENTED

I. IN THE ABSENCE OF A CAUSAL CONNECTION BETWEEN A MOTOR VEHICLE ACCIDENT AND THE ONGOING NEED FOR ROOM AND BOARD BY A PERSON INJURED IN THE ACCIDENT, DOES THE FOOD PURCHASED BY, OR ON BEHALF OF, THE PERSON INJURED IN THE ACCIDENT CONSTITUTE AN "ALLOWABLE EXPENSE" PURSUANT TO THE REQUIREMENTS OF MCL 500.3107(1)(a)?

The trial court answered, "Yes".

The Court of Appeals answered, "Yes".

Plaintiff-Appellee contends that the answer should be "Yes".

Defendant-Appellant contends that the answer should be, "No".

Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION, contends that the answer should be, "No".

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INTRODUCTION

The function of an amicus curiae, literally a "friend of the court", is to "make useful suggestions to the court". Blanchard v Boston & Maine Railroad, et al, 86 NH 263; 167 A 158, 160 (1933). An earlier New Hampshire case stated that the use of the term "implies the friendly intervention of counsel to remind the court of some matter of law which has escaped its notice, and in regard to which it appears to be in danger of going wrong". Taft v Northern Transportation Co, 56 NH 414, 416 (1876). As applicable to this case, the function of amicus curiae, AUTO CLUB INSURANCE ASSOCIATION ("ACIA"), is to provide another perspective on issues of relevance to the amicus so that, in deciding this case, this Court will be fully apprised of the breadth of the matters at hand.

The Brief of Defendant-Appellant, State Farm Mutual Automobile Insurance Company (STATE FARM Brief) is divided into two sub-issues. First, STATE FARM maintains that this Court should exercise its role as the ultimate judicial authority as to the appropriate construction of Michigan's statutes by ruling that present controlling authority from the Court of Appeals misinterprets §3107(a) of the No-Fault Act as it pertains to whether, in the absence of a causal connection between a motor vehicle accident and the ongoing need for room and board by a person injured in the accident, the food purchased by, or on behalf of, the person injured in the accident constitutes an "allowable expense" as that phrase is used therein. (STATE FARM Brief at 1-4, 9-26).

Second, STATE FARM submits that this Court should exercise its "error-correcting" role and conclude that, because DOUGLAS W. GRIFFITH, ward of Plaintiff-Appellee, PHYLLIS L. GRIFFITH, owns the home in which he resides, to the extent that this Court disagrees with STATE FARM's analysis in the prior argument, MR. GRIFFITH provided room and board

accommodations to himself; therefore, no expenses are incurred. (STATE FARM Brief at 4, 27-31).

It is the former consideration, the overarching legal issue undergirding this appeal, that impelled ACIA to file its Motion for Leave to Participate as Amicus Curiae in Support of Motion for Reconsideration. Accordingly, ACIA will concentrate on the question of whether, in the absence of a causal connection between a motor vehicle accident and the ongoing need for room and board by a person injured in the accident, the food purchased by, or on behalf of, the person injured in the accident constitutes an "allowable expense" as that phrase is used therein.

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STATEMENT OF FACTS

ACIA relies upon the Statement of Facts and Proceedings contained in the STATE FARM Brief.

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I. IN THE ABSENCE OF A CAUSAL CONNECTION BETWEEN A MOTOR VEHICLE ACCIDENT AND THE ONGOING NEED FOR ROOM AND BOARD BY A PERSON INJURED IN THE ACCIDENT, THE FOOD PURCHASED BY, OR ON BEHALF OF, THE PERSON INJURED IN THE ACCIDENT DOES NOT CONSTITUTE AN "ALLOWABLE EXPENSE" PURSUANT TO THE REQUIREMENTS OF MCL 500.3107(1)(a).

Pursuant to the Michigan No-Fault Act, entitlement to personal protection (first-party no-fault) benefits is dependent on the accidental bodily injury suffered by the insured "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". MCL 500.3105(1). The No-Fault Act then defines the categories pursuant to which personal protection benefits may be paid. Of significance to this appeal, the No-Fault Act provides that personal protection benefits are payable for:

> "Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

MCL 500.3107(1)(a).

Based on the plain language of those statutory provisions, it would appear evident that, to qualify for reimbursement by a no-fault insurer as personal protection benefits, the "allowable expenses" of MCL 500.3107(1)(a) must arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" as required by MCL 500.3105(1). The question posed by the STATE FARM Brief is whether the purchase of food for Plaintiff's ward, DOUGLAS W. GRIFFITH, who is residing in his own home after suffering a severe brain injury in a motor vehicle accident, constitutes an "allowable expense" "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle".

Except for one case from the Court of Appeals, whose opinion this Court later declared to be of no precedential force or effect, the analysis of this question in Michigan jurisprudence has

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not concentrated in the first instance on the relevant statutory language itself. In this amicus brief, ACIA will (1) set forth the presently-operative analysis with commentary and then (2) present an alternative analysis that more closely adheres to relevant canons of statutory construction. Adoption of this alternative analysis would require that this Court REVERSE the Court of Appeals' affirmance of that part of the trial court's Order Granting, in Part, and Denying, in Part, Plaintiff's Motion for Legal Ruling on the Elements of Allowable Room and Board Expenses Under the Michigan No-Fault Act stating:

> "IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall be entitled to receive from Defendant, as an allowable expense under section 3107(1)(a) of the No-Fault Act, the cost of food provided to Douglas Griffith, and that the portion of Plaintiff's motion seeking recovery for said expense should be, and the same is hereby, GRANTED for the reasons stated on the record."

(Order Granting, in Part, and Denying, in Part, Plaintiff's Motion for Legal Ruling on the Elements of Allowable Room and Board Expenses Under the Michigan No-Fault Act, 2) (Appendix to STATE FARM Brief at **43a**).

A. <u>State of Michigan Jurisprudence as to Question Presented</u>

As did MR. GRIFFITH in this case, John Manley suffered a severe head injury in a motor vehicle accident. Litigation ensued. The trial court determined that John's parents were entitled to $30 per day for room and board as long as he was cared for at home. The defendant appealed to the Court of Appeals. Among the many issues presented for appellate consideration, the defendant contended that the trial court committed reversible error in so ruling.

The Court of Appeals reversed the trial court. Citing the language of §3107(1)(a), the Court of Appeals observed:

> "That statute specifies that products, services, and accommodations not reasonably necessary for the injured person's care, recovery, or rehabilitation are not 'allowable expenses'. The necessity for the performance

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of ordinary household tasks has nothing to do with the injured person's care, recovery, or rehabilitation; such tasks must be performed whether or not anyone is injured."

Manley v Detroit Automobile Inter-Insurance Exchange, 127 Mich App 444, 453-454; 339 NW2d 205 (1983). Accordingly, the Court of Appeals reasoned:

> "Products, services, or accommodations which are as necessary for an uninjured person as for an injured person are not 'allowable expenses'. In applying this rule, it is necessary to distinguish between injured persons for whom institutionalization in a hospital or nursing home is reasonably necessary and injured persons cared for at home. For example, food is as necessary for an uninjured person as for an injured person. **Food, therefore, is not ordinarily an 'allowable expense' for an injured person cared for at home, unless the nature of the injury makes a special diet reasonably necessary.** However, ordinarily a institutionalized person must obtain food through the institution, and the cost of obtaining food through the institution presents an extraordinary expense not analogous to the cost of obtaining food at home. Therefore, for the institutionalized injured person, food obtained through the institution is ordinarily an 'allowable expense'."

Id. at 454.

John's parents sought leave to appeal to this Court. This Court granted leave to appeal. Manley v Detroit Automobile Inter-Insurance Exchange, 425 Mich 140; 388 NW2d 216 (1986). The majority opinion of this Court did not decide the room and board issue. Of significance, however, this Court concluded:

> "It appears on review of the record made in the trial court and of the briefs in the Court of Appeals that the question whether food, shelter, utilities, clothing, and other such maintenance expenses are an allowable expense when the injured person is cared for at home was not presented in the trial court, or, indeed argued in the Court of Appeals. We do not address that question. **The opinion of the Court of Appeals on that question shall not be regarded as of precedential force or effect**."

Id. at 152-153 (emphasis added).

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Of equal significance was the fact that Justice BOYLE issued an opinion, concurring in part, dissenting in part. Justice BOYLE went further than the majority opinion in discussing the room and board issue, taking issue with the rationale of the Court of Appeals:

> "I agree with the Court of Appeals to the extent that it remanded the case for a determination of actual expenses incurred for room and board. However, I cannot agree with the Court of Appeals broad determination that '[p]roducts, services, or accommodations which are as necessary for an uninjured person as for an injured person are not "allowable expenses",' *Manley v DAIIE, supra*, p 454, for purposes of MCL 500.3107(a); MSA 24.13107(a)."

Id. at 168 (BOYLE, J., concurring in part, dissenting in part).

Justice BOYLE concluded that the jurisprudential principle adopted by the Court of Appeals was both "unwieldy and unworkable":

> "The cost of institutional care for John Manley included, for example, food, an item as necessary to uninjured persons as to John. I find no principled basis for deciding that food provided to John at home is not as much an 'allowable expense' as the food provided in a licensed medical care facility. **Where a person would who normally would require institutional treatment is cared for at home in a quasi-institutional setting made possible by the love and dedication of the injured victim's family**, the test for 'allowable expenses' should not differ from that set out in MCL 500.3107(a); MSA 24.13107(a)[.]"
>
> * * * *
>
> "The focus should be on the product, service, or accommodation provided, not upon the provider's status as a relative. An item that would be provided in an institutional setting is not barred from being an 'allowable expense' merely because it is provided at home instead."

Id. at 168-169 (BOYLE, J., concurring in part, dissenting in part).

Remarkably, since the Supreme Court's opinion in Manley, this question went unlitigated on the appellate level until the Court of Appeals issued its opinion in Reed v Citizens Insurance Co, 198 Mich App 443; 499 NW2d 22 (1993), lv den, 444 Mich 964; 514 NW2d 773 (1994). There, Steven Troy was catastrophically injured in an automobile accident to the extent that he

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was unable to care for himself. After living in several different treatment facilities for a period of time, he was moved into a home purchased by his mother, the plaintiff in that case.

Of significance to the issue presented by the STATE FARM Brief, the trial court denied the plaintiff's motion for leave to file a second amended complaint that would include a claim for reimbursement for room and board:

> "The trial court denied leave, holding that an injured person's daily living expenses or room and board are not recoverable under MCL 500.3107; MSA 24.13107, because such expenses would have been incurred regardless of the injury sustained. Thus, leave was denied because the proposed amended complaint had failed to state a claim upon which relief could be granted."

Id. at 446.

The Court of Appeals concluded that the trial court's ruling was erroneous:

> "The question before us is whether under MCL 500.3107(1)(a); MSA 24.13107(1)(a) room and board, admittedly an 'allowable expense' where an insured's injuries require that he reside in an institution, is also an allowable expense when the insured who could be institutionalized is cared for at home. We hold that it is."

Id. at 450.

After citing the text of §3107(1)(a) and briefly discussing the Manley opinions, the Court of Appeals turned to the meat of its analysis. The Court of Appeals first observed that it is not disputed under that section of the No-Fault Act that "family members may be compensated for the services they provide at home to an injured person in need of care". Id. at 452 (citations omitted). Accordingly, the Court of Appeals reasoned:

> "We see no compelling reason not to afford the same compensation under the act to family members who provide room and board. **Subsection 1(a) does not distinguish between accommodations provided by family members and accommodations provided by institutions, and we decline to read such a distinction into the act**. Moreover, holding that accommodations provided by family members is an 'allowable expense' is in accord with the policy of this state. See *Sharp v Preferred Risk*

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> *Mutual Ins Co*, 142 Mich App 499, 511-512; 370 NW2d 619 (1985); *Manley*, 425 Mich 168-169 (BOYLE, J., concurring in part and dissenting in part); *Van Marter, supra*, 181. **Denying compensation for family-provided accommodations while allowing compensation in an institutional setting would discourage home care that is generally, we believe, less costly than institutional care. Irrespective of cost considerations, it can be stated without hesitation that home care is more personal than that given in a clinical setting**."

Id. at 452 (emphasis added). Therefore, the Court of Appeals explained:

> "**We hold that, where an injured person is unable to care for himself and would be institutionalized were a family member not willing to provide home care, a no-fault insurer is liable to pay the cost of maintenance in the home**. We disagree with the rule stated in this Court's opinion in *Manley* that expenses that are as necessary for uninjured persons as they are for injured persons are not allowable expenses."

Id. at 453 (emphasis added). The Court of Appeals amplified its holding:

> "The injured victim and the victim's family should be able to make the decision regarding where the victim's care occurs, rather than the no-fault insurer. This can be accomplished without placing an unreasonable economic burden on the no-fault insurer. The reasonableness of the expenses incurred may be judged by comparison with rates charged by institutions. Issues relating to the reasonableness of the charges or reasonableness of the accommodations under MCL 500.3107(1)(a); MSA 24.13107(1)(a), if disputed, should appropriately be resolved by the trier of fact."

Id. (citations omitted).

The Court of Appeals, therefore, reversed the trial court's refusal to permit the plaintiff to file a second amended complaint.

Justice BOYLE's opinion in Manley and the opinion of the Court of Appeals in Reed share one striking characteristic: there is no mention of §3105(1) of the No-Fault Act. There is no discussion as to whether the need for products, services and accommodations at issue in those cases was precipitated by injuries "arising out of the ownership, operation, maintenance or use of

a motor vehicle as a motor vehicle". In both Justice BOYLE's opinion in Manley and the Court of Appeals opinion in Reed, it is, apparently, simply presumed to be so.

The failure of these opinions to discuss the question of whether the prerequisite enunciated in §3105(1) of the No-Fault Act has been satisfied fatally taints their analyses. For the relevant question is not whether food served at an institution is the functional equivalent of food purchased for consumption at home for purposes of §3107(1)(a). The relevant question is whether food served at an institution is the functional equivalent of food purchased for consumption at home for purposes of **§3105(1)**. Now, while there is no single answer to the latter question, it is an analysis that must be undertaken to adequately respond to the question presented by this case. As this analysis has not hitherto been undertaken by this Court or the Court of Appeals it is necessary to do so here.

B. Food: A §3105(1) Analysis

To set the stage for this analysis, let us return to that which is statutorily unassailable: first-party no-fault benefits are payable only as a result of an "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". MCL 500.3105(1). Surely, however, not every automobile accident resulting in accidental bodily injury to an individual mandates payment of the same first-party benefits. It is, therefore, useful, to enumerate factual scenarios in which the accidental bodily injury becomes progressively worse to try to determine when "food" becomes an "allowable expense" arising out of the sequelae of the accident. In so doing, it may be possible to offer an outcome-predictive test that can be applied to the facts of cases like this, involving catastrophic injury.

First, consider the "garden-variety" rear-end collision in which the injured party suffers from neck and back pain. The injured party does not go the hospital but does eventually consult

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with her physician. The physician performs a physical examination and takes x-rays. The physician diagnoses a strain and prescribes home bed rest and physical therapy. The injured party is not to return to work for two weeks. During that two-week period of enforced idleness, is the food consumed by the injured party an "allowable expense"? The answer would clearly be "No". Although the injured party is confined to her home, her consumption of food during that time does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the automobile accident and whether or not she was at home, on the job, or enjoying recreational activities.

Now vary the facts slightly. In this scenario, the injured party goes directly from the scene of the accident to the hospital and meets her physician there. The physician performs the same physical examination and takes the same x-rays. The physician arrives at the same diagnosis. However, because the injuries suffered are not serious or life-threatening, it takes an inordinately long time to receive the results. During this time, the injured party becomes hungry and buys a snack from the hospital cafeteria. Upon her discharge from the emergency room, the injured party returns home where she stays for the requisite two weeks. During that two-week period of enforced idleness, is the food consumed by the injured party an "allowable expense"? The difference between the two scenarios is that the injured party had consumed food while at the hospital, although the food was directly purchased by the injured party and the injured party was not admitted to the hospital. The answer still would clearly be "No". Although the injured party is confined to her home, her consumption of food during that time does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the

automobile accident and whether or not she was at home, on the job, or enjoying recreational activities.

The value of this second scenario is to demonstrate that the consumption of food in an institutional setting, of itself, does not make the subsequent consumption of food at home an "allowable expense".

In the third scenario, the injured party goes directly from the scene of the accident to the hospital and meets her physician there. The physician performs the same physical examination and takes the same x-rays. This time, the x-rays disclose an injury of sufficient severity that it is necessary to admit the injured party for observation. The injured party stays overnight, eating meals prepared by dieticians at the hospital. Once discharged, the injured party returns home where she stays for the requisite two weeks. During that two-week period of enforced idleness, is the food consumed by the injured party an "allowable expense"? It should be emphasized that, in this scenario, while at the hospital, the injured party consumed food that was paid for by the applicable no-fault insurer as part of the hospital bill. Does that fact now require that the no-fault insurer pay for the food consumed at home by the injured party during the two-week convalescence? Once again, the answer should be "No". Although the injured party is confined to her home, her consumption of food during that time does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the automobile accident and whether or not she was at home, on the job, or enjoying recreational activities.

The value of this third scenario is to demonstrate that the consumption of food in an institutional setting, of itself, does not make the subsequent consumption of food at home an

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"allowable expense", even if the food consumed in the institutional setting is paid for by the no-fault insurer.

Now assume that the collision involving the injured party was more severe than a "garden variety" rear-end collision and that, in addition to the neck and back injuries, the injured party suffers a compound fracture of her right leg. The severity of the fracture requires surgery and the injured party remains in the hospital for two weeks. During this time in the hospital, the injured party consumed food that was paid for by the applicable no-fault insurer as part of the hospital bill. The injured party then is released to continue recovery at home. The injured party is ambulatory but, because of the fact that the fracture occurred in her right leg and because of the neck and back injuries, she is confined to home for a period of weeks. Do these facts now require that the no-fault insurer pay for the food consumed at home by the injured party during her convalescence at home? Once again, the answer should be "No". Although the injured party is confined to her home, her consumption of food during that time does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the automobile accident and whether or not she was at home, on the job, or enjoying recreational activities.

The value of this fourth scenario is to demonstrate that the consumption of food in an institutional setting, of itself, does not make the subsequent consumption of food at home an "allowable expense", even if the food consumed in the institutional setting is paid for by the no-fault insurer and regardless of the amount of time spent in the hospital by the injured party.

Varying this scenario slightly, assume that the injury to her leg requires that the injured party stay in an institutionalized setting beyond the time necessary to initially stabilize the situation

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and perform necessary medical procedures to promote the best possible long-term prognosis for the leg. Therefore, instead of doing all of her convalescence at home, the injured party is transferred from a primary care bed in the hospital into the hospital's extended care facility. The extended care facility functions in much in the same fashion as an eldercare convalescent facility. During her stay in the extended care facility--as well as in the primary care bed in the hospital--the injured party consumed food that was paid for by the applicable no-fault insurer as part of the hospital bill. The injured party then is released to continue recovery at home. Do these facts now require that the no-fault insurer pay for the food consumed at home by the injured party during her convalescence at home? Once again, the answer should be "No".[1] Although the injured party is confined to her home, her consumption of food during that time does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the automobile accident and whether or not she was at home, on the job, or enjoying recreational activities.

This scenario begins to approximate the factual situation in the catastrophic cases, in that extended convalescent care was required for each injured person even after that person's medical condition was stabilized to whatever degree it could. **Thus, the mere fact that the injured party is required to continue her recovery in an extended care facility, of itself, does not make the subsequent consumption of food at home an "allowable expense".**

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[1]It is worthwhile to observe that there would be, presumably, no dispute about the fact that the no-fault insurer would not be liable to pay for the food consumed by the injured party at home if the injured party went directly back to work and resumed, perhaps with some restrictions, her normal life.

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Varying this scenario, assume that the hospital to which the injured person is taken for initial treatment is located at a considerable distance from the injured person's home. The injured party declines to accept her physician's recommendation to be transferred to the extended care facility and insists on being discharged to her home where she will continue her convalescence with the help of her family and hired caregivers. Do these facts now require that the no-fault insurer pay for the food consumed at home by the injured party during her convalescence at home? Once again, the answer should be "No". Although the injured party is confined to her home, her consumption of food during that time does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the automobile accident and whether or not she was at home, on the job, or enjoying recreational activities.

In this scenario, additional factors are added--the desire of the injured party to be cared for at home and the willingness of family members to undertake that care. **Nevertheless, the mere fact that the injured party desires to be cared for at home does not make the consumption of food at home an "allowable expense".**

In order to continue this analysis, it is necessary to assume further injury to our hypothetical injured party. Now assume that the accident has rendered her a paraplegic--although her mental skills are unimpaired. After stabilization and therapy, the injured party will require intermittent care on a gradually diminishing basis. The injured party is transferred to the aforementioned extended care facility and then is discharged to her home. At home, she will continue to receive care on a daily basis both from licensed caregivers and from family members. It is anticipated that, absent breakthroughs in medical research and technology, the injured party will need intermittent care on a daily basis for the duration of her life. Do these facts now require that

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the no-fault insurer pay for the food consumed at home by the injured party for the duration of her life? Once again, the answer should be "No". Her consumption of food during the remainder of her life does not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Her consumption of food arises out of the need for sustenance that would occur whether or not she was in the automobile accident and whether or not she was at home.[2]

In this scenario, for the first time, the concept of lifetime care is introduced. In addition, some care will be provided to the injured party by members of her family. Nevertheless, those facts of themselves, do not make the injured party's consumption of food during the remainder of her life an "allowable expense".

Nor is that conclusion altered if it is assumed that the injured party declines transfer to the extended care facility.

Now assume that the injured party has suffered quadriplegia, but suffers no impairment of mental skills. The injured party cannot care for herself. She requires 24-hour care. She agrees to be placed in a treatment facility consistent with her medical needs. She consumes food while in the facility. There is no question but that the applicable no-fault insurer is responsible--assuming the reasonableness of the charges contained therein--for the entire amount of the bills generated by the facility. Presumably, the facility includes in its charges the cost of the food consumed by the injured party.

The injured party then requests that she be discharged from the facility and returned to her home. The request cannot immediately be acted upon because it is necessary to renovate the home to accommodate her needs. Once she is moved, the medical needs of the injured party will be

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[2]This conclusion is strengthened by recognizing the capabilities of paraplegics to live a functional life, including maintaining a job and enjoying certain recreational activities.

taken care of by a combination of licensed caregivers and her family. Her household needs (including banking and bill-paying) will be looked after by her family.

In this situation, the applicable no-fault insurer will be responsible for reimbursement of reasonable expenses incurred in the renovation of the injured party's home. MCL 500.3107(a). The applicable no-fault insurer will be responsible for reimbursement of reasonable expenses incurred in meeting the medical needs of the injured party, regardless of whether the services were performed by licensed caregivers or family members. MCL 500.3107(a). See Van Marter v American Fidelity Fire Insurance Company, 114 Mich App 171; 318 NW2d 679 (1982). The applicable no-fault insurer will be responsible for reimbursement of reasonable expenses incurred by family members in looking after the injured party's household needs. MCL 500.3107(c). Botsford General Hospital v Citizens Insurance Company, 195 Mich App 127; 489 NW2d 137 (1992).

All of those expenses, it should be emphasized, qualify as allowable expenses pursuant to §3107 of the No-Fault Act because all of those expenses were necessitated by injuries suffered by the injured party "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". MCL 500.3105(1). The automobile accident left the injured party in a state of quadriplegia. As a direct result of that accident, the injured party needed to be moved by others through her home. Due to her physical condition, such daily movement could not be accomplished unless her home was renovated. Obviously, her medical needs were necessitated by the accident. Finally, due to the severity of her injuries, the injured party would be unable to undertake the same household tasks as before the accident.

So whither food? Unlike the categories of products, services and accommodations discussed in the previous paragraphs, even in a state of quadriplegia, the consumption of food by

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the injured party after the accident was not necessitated by the accident--the consumption of food did not arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". **Accordingly, even where the injured party cannot care for herself and would require 24-hour care due to physical impairment, there is no statutory reason why the applicable no-fault insurer should have to pay for the food that the injured party consumes after being discharged to her home.**[3]

In the last scenario, the injured party is also rendered a quadriplegic. In addition, she suffers a closed head injury resulting in traumatic brain damage and severe mental impairment. According to Justice BOYLE and the Court of Appeals in Reed, it is that fact--the severe mental impairment--that changes everything. The question that must eventually be decided by this Court is "Why?".

Justice BOYLE was unable to find a "principled basis for deciding that food provided to John is not as much an 'allowable expense' as the food provided in a licensed medical care facility". Manley, supra, 425 Mich at 168 (BOYLE, J., concurring in part, dissenting in part) (citation omitted). As the preceding analysis demonstrates, there is a "principled basis" for distinguishing, in general, between food consumed in an institutional setting and food consumed in a non-institutional setting. Where the fact of institutionalization--including admission to a hospital's emergency room--arises out of injuries suffered as a result "of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle", the applicable no-fault insurer will be required to reimburse "reasonable charges incurred for reasonably necessary products, services and

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[3]The only caveat to that conclusion occurs where, specifically due to her physical condition, a precise diet is prescribed by the injured party's physician. In that situation, the accident leads to the injury. The nature of the injury leads to the diet. The diet, therefore, is necessitated by injuries that arise "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle".

accommodations for an injured person's care, recovery, or rehabilitation". In that setting, food is a necessary adjunct--without food, the injured person dies of starvation--to the injured party's "care, recovery, or rehabilitation". Compare Hamilton v AAA Michigan, 248 Mich App 535 (2001) (whether charges for basic inpatient telephone and television services are reasonably necessary to a patient's "care, recovery, or rehabilitation; *held*: fact question to be decided on a case-by-case basis).

If Justice BOYLE's initial conclusion is carried over to the non-institutional setting, then, in any situation in which an injured person is convalescing at home, the applicable no-fault insurer would have to pay for the food consumed by the injured person during the period of convalescence. Yet, as the preceding analysis illustrates, that is not the state of the law in Michigan. In no other circumstance but those found in Manley and Reed has an appellate court of this state gone so far as to find that the cost of the food consumed by an injured person in a non-institutional setting is an "allowable expense". It is, therefore, necessary to search further.

It would appear that Justice BOYLE felt aggrieved at the "unfairness" visited upon those persons who were willing to care for catastrophically injured persons so as to keep them out of "institutional settings":

> "**Where a person would who normally would require institutional treatment is cared for at home in a quasi-institutional setting made possible by the love and dedication of the injured victim's family**, the test for 'allowable expenses' should not differ from that set out in MCL 500.3107(a); MSA 24.13107(a)[.]"
>
> * * * *
>
> "An item that would be provided in an institutional setting is not barred from being an 'allowable expense' merely because it is provided at home instead."

Id. at 169 (BOYLE, J., concurring in part, dissenting in part) (emphasis added).

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Standing alone, it is a reasonable argument. After all, who would be so heartless as to force a family to make the decision between caring for a catastrophically-injured person at home with the assumed attendant financial hardship and leaving the injured person in an institutional setting where the costs of room and board would be borne by the applicable no-fault insurer? Yet, the argument cannot stand alone. There is a statutory overlay--the Michigan No-Fault Act--that must be taken into account. In addition, some of the implicit assumptions in the argument need to be addressed as well.

In Belcher v Aetna Casualty and Surety Co, 409 Mich 231; 293 NW2d 594 (1980), this Court explained the rationale behind the statutory scheme embodied in the No-Fault Act:

> "Enactment of the Michigan no-fault insurance act signalled a major departure from prior methods of obtaining reparation for injuries suffered in motor vehicle accidents. The Legislature modified the prior tort-based system of reparation by creating a comprehensive scheme of compensation **designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents**. Under this system, losses are recovered without regard to the injured person's fault or negligence. The act contemplates that in a majority of cases, **specific recognized losses suffered as a result of motor vehicle accidents** will be compensated for by a person's own insurer."

Id. at 240 (citations omitted) (emphasis added).

The Court of Appeals has recognized that, in order for the system to work, no-fault insurers should have some flexibility in the provision of those benefits. In Kitchen v State Farm Insurance Co, 202 Mich App 55; 507 NW2d 781 (1993), the Court of Appeals was confronted with the question of who should own title to a home built as a housing accommodation for a catastrophically-injured young girl with funds provided by the no-fault insurer pursuant to the requisites of MCL 500.3107(1)(a):

> "We agree with defendant that as long as it satisfies its statutory obligation to pay for all reasonable charges incurred for those products, services, and accommodations reasonably necessary to meet Elisha's needs, **defen-**

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> **dant should be allowed to choose the least expensive adequate means of providing those items. This is completely consistent with the goal of the no-fault insurance system, which is to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses <u>at the lowest cost to both the individual and the no-fault insurance system</u>.** Ordering that Elisha have a life estate in a home that provides her with the necessary accommodations to meet her reasonable needs satisfies the requirements of MCL 500.3107(1)(a); MSA 24.13107(1)(a). Declining to award Elisha unencumbered legal title to a home in which defendant has a quarter-million-dollar investment simultaneously operates as a cost-containment measure that benefits the no-fault insurance system. Because both Elisha's needs and the goals of the no-fault act are met by holding the property in trust for Elisha during her lifetime, we find no error in the trial court's order."

<u>Id</u>. at 58-59 (citation omitted) (emphasis added).

Taken in its entire context, Justice BOYLE's concern about the quandary potentially faced by family members--with all due respect to Justice BOYLE--is somewhat misplaced. In the first place, those persons who care for an injured person "at home in a quasi-institutional setting" are not bereft of assistance under the No-Fault Act. As set forth in the preceding analysis, caregivers --whether licensed medical personnel or not--are entitled to payment for performing numerous services on behalf of the injured person. In addition, to the extent that housing renovations are necessary, the applicable no-fault insurer is responsible for payment thereof. Of equal significance, the mere fact that home care may be less expensive than institutional care does not mean, of itself, that the no-fault insurer is getting some sort of improper windfall at the expense of the injured person. Rather, as in <u>Kitchen</u>, it is a situation where necessary services are provided "at the lowest cost".

In addition, the test for "allowable expenses" does not differ with the location of where the injured person is being treated or is convalescing. "Allowable expenses" always consist of "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation". MCL 500.3107(1)(a). However, "allowable

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expenses" must be incurred due to injuries suffered by the injured party "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". MCL 500.3105(1). If the expenses for which first-party no-fault benefits are sought do not "aris[e] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle", then those expenses are not "allowable expenses". If the expenses for which first-party no-fault benefits are sought are not "allowable expenses", then §3107(1) is simply inapplicable.

Finally, Justice BOYLE is absolutely correct that "[a]n item that would be provided in an institutional setting is not barred from being an 'allowable expense' **merely** because it is provided at home instead". (Emphasis added.) For example, the fact that medical care is being provided in an institutional setting is not barred from being an "allowable expense" when it is provided in the home of the injured person. Rather, the pertinent question is whether there is the requisite causal nexus between the requested benefits and the injuries suffered by the injured person as a result of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Take the Court of Appeals' opinion in Hamilton v AAA Michigan, supra. There, the Court of Appeals concluded that the question of whether charges for basic inpatient telephone and television services are reasonably necessary to a patient's care, recovery, or rehabilitation is a question of fact that requires consideration of the individual circumstances of each claimant.

Of significance to this particular argument, in so concluding, the Court of Appeals commented:

> "We agree with the federal courts' conclusions that, on the surface, services such as telephones and televisions are more properly seen as personal comfort items that have no relation to a patient's health care, recovery or rehabilitation. **Something more, such as a specific prescription by a physician or medical professional, is required to establish the causal relationship required under the no-fault act**."

Id. at 549 (emphasis added).

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Assume that an injured person, while in the hospital, received such a prescription, requiring that the applicable no-fault insurer to pay for telephone and television services. After the person was discharged home, in the absence of another prescription, can there be any question but that the no-fault insurer would not now have to pay the telephone and cable bills amassed by the injured person? The Court of Appeals explained:

> "We do not quarrel with plaintiff's observation concerning the practicality and convenience of telephones and televisions in today's society. However, plaintiff offers no meaningful distinction between basic telephone and television service and other items such as books, radios, laptop computers, and so forth, all of which may be claimed to **contribute in a general way to a patient's care, recovery, or rehabilitation, but none of which may be reasonably necessary in a specific instance**."

Id. at 459 (emphasis added).

Food, indeed, contributes in a general way (absent, of course, a prescription for a specific diet) to an injured person's care, recovery, or rehabilitation. After all, in the absence of food, the injured person would die. Yet, (except where there is a prescription for a specific diet) there is no causal nexus between the consumption of food and the injuries suffered by the injured person arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

Indeed, the better question may be asked, "Why **should** a no-fault insurer pay for food consumed by an injured person in an **institutional** setting?" There are good reasons, consistent with the objectives of the No-Fault Act, to require that the no-fault insurer be responsible for that expense. In an institutional setting, it is patently reasonable to permit the institution to have control over the food served to their patients. The patient (or the patient's family) is not, therefore, in a position to insist that the patient consume food that could be prepared or obtained at a lower cost. The patient (or the patient's family) is not in control over the supply of food. In that circumstance, by definition, the cost of food consumed by the patient is likewise not in

control of the patient or the family.[4] Furthermore, the cost associated with the provision of food in an institutional setting usually includes overhead factors that inflate the price well beyond the cost of what could be obtained outside the institutional setting.

In this setting, the treatment facility exercises monopoly control over the provision of food--there is no meaningful freedom to choose. The only remaining question is who should bear the burden of that situation--the patient or the applicable no-fault insurer. The answer to that question lies, appropriately, in §3105(1) of the No-Fault Act. All that needs to be known is why the injured person is in the treatment facility to begin with. Under all of the scenarios advanced in this pleading, the injured person is in a treatment facility due to injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". Accordingly, the applicable no-fault insurer is responsible for the cost of food consumed by the injured person.

As demonstrated by the preceding analysis, however, no such economic anomaly exists when an injured person is discharged from a medical treatment facility. In the absence of a prescription specifying a diet regimen as being reasonably necessary for the injured person's care, recovery, or rehabilitation, there is no causal nexus between the consumption of food and the injuries suffered by the injured person arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

In the end, therefore, Justice BOYLE's concerns, expressed in her concurring and dissenting opinion in Manley, supra, are either at least partially unfounded or not jurisprudentially

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[4]Theoretically, it could be argued that the patient could be transferred to a facility that places a lesser charge on food consumption. Of course, there a myriad of reasons why such an argument would fail in the real world. For example, the patient's condition might not permit transfer. Or, there may be no facility in a reasonable geographical radius of the patient's home to which he or she could be transferred. In addition, the variation in cost factors between facilities may be so marginal as to be outweighed by the cost of transfer.

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cognizable within the context of the No-Fault Act. We can, however, still look to the rationale of the Court of Appeals in Reed v Citizens Insurance Co, supra, to see whether it adds anything to this analysis.

In Reed, the Court of Appeals offers three semi-related reasons as to why catastrophically injured persons with resulting mental impairments that preclude them from caring for themselves should be treated differently than any other person injured in an automobile accident as it relates to the provision of food. First, the Court of Appeals repeats Justice BOYLE's claim that there is no reason "to distinguish between accommodations provided by family members and accommodations provided by institutions". Id. at 452. As set forth in the accompanying text, that contention simply begs the question of whether the products or services or accommodations at issue have the requisite causal nexus to injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle". The preceding analysis establishes that payment by the no-fault insurer of reasonable charges for food consumed by an injured person in a treatment facility does not, of itself, require a no-fault insurer pay for food consumed by an injured person while convalescing at home.

Next, the Court of Appeals argues that family members will be deterred from providing home care if no-fault insurers are not required to pay for room and board. Id. The Court of Appeals posits that such a circumstance would be deleterious to injured persons because "it can be stated without hesitation that home care is more personal than that given in a clinical setting", as well as being, in general, "less costly than institutional care". Id.[5]

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[5]The Court of Appeals actually concluded:

> "We hold that, where an injured person is unable to care for himself and would be institutionalized were a family member not willing to provide
> (continued...)

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By so stating, the Court of Appeals appears to ignore the numerous first-party benefits that are available in home care settings. The Court of Appeals also seems to argue that no-fault insurers should pay for anything an injured person may need or desire--regardless of the causal nexus mandated by MCL 500.3105(1)--as long as the total is less than what would be paid for institutional care. Both this Court and the Court of Appeals have rejected that argument as not comporting with the statutory objectives of the No-Fault Act. Belcher, supra; Kitchen, supra.

Finally, the Court of Appeals also stated that "the injured victim and the victim's family should be able to make the decision regarding where the victim's care occurs, rather than the no-fault insurer". Id. at 453. However, nothing in the preceding analysis should be construed as having anything to do with who makes the decision about where an injured person's care occurs--as long as the location is "reasonable". MCL 500.3107(1)(a).

It is not surprising, then, that the Court of Appeals' rationale in Reed, drawing heavily upon Justice BOYLE's opinion in Manley, suffers from the same deficiencies. As with Justice BOYLE's concerns, expressed in her concurring and dissenting opinion in Manley, supra, the reasons given by the Court of Appeals in Reed, in adopting Justice BOYLE's analysis, are either at least partially unfounded or not jurisprudentially cognizable within the context of the No-Fault Act.

(...continued)

> home care, a no-fault insurer is liable to pay the cost of maintenance in the home."

Id. at 453. It is not clear whether the seeming distinction between an injured person unable to care for herself but with sufficient cognitive skills to choose home care--even if 24-hour care were required--and an injured person unable to care for herself but lacking cognitive skills so that she would be institutionalized were it not for a family member stepping forward is advertent.

Yet, Reed is still binding upon all but this Court. MCR 7.215(I). The time has come for this Court to take a fresh look at this issue, an examination grounded in the first instance in the actual language of the Michigan No-Fault Act. For the reasons set forth herein, this Court should hold that the determination of whether the cost of food provided to a person in a non-institutional setting and injured in a motor vehicle accident is an "allowable expense" under §3107(1)(a) must include a finding that a causal nexus exists between the consumption of food and the motor vehicle accident as required by §3105(1).

In this case, no such finding was made. It would be appropriate for this Court, after clarifying the jurisprudential basis for requiring such a finding, to remand to the trial court for such purpose.

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RELIEF

Amicus Curiae, AUTO CLUB INSURANCE ASSOCIATION, respectfully requests that this Court:

(1) HOLD that the determination of whether the cost of food provided to a person in a non-institutional setting and injured in a motor vehicle accident is an "allowable expense" under §3107(1)(a) must include a finding that a causal nexus exists between the consumption of food and the motor vehicle accident as required by §3105(1); and

(2) REMAND to the trial court with instructions to make the requisite finding and, based thereon, determine whether the damages at issue constitute an "allowable expense".

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